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DEPARTMENT FOR EUR(JONES), EUR/SCE(FOOKS/STINCHCOMB), L,
S/CRS

E.O. 12958: DECL: CLOSURE OF OHR

TAGS: [PGOV](#) [PREL](#) [UN](#) [BK](#)

SUBJECT: BOSNIA - OHR URGES ACTION ON POST-OHR IMMUNITY

Classified By: Ambassador Charles English. Reason 1.4(b) and (d).

1. (C) On December 11 the HighRep and Deputy HighRep provided Quint Ambassadors with a non-paper outlining the need for OHR immunity following OHR's closure. The paper, which is contained in paragraph two below, describes the urgency of the problem and proposes several ways of addressing it; though it seemed to us from the conversation that the HighRep's preference was for a UN resolution. We share OHR's concerns about failing to address the immunity issue, and we believe that it is likely to emerge as an important component to discussion within the Quint (and the Peace Implementation Council) about OHR closure. With this is in mind, we would encourage early discussions among political and legal experts on a way forward.

2. (C) BEGIN TEXT:

NON-PAPER: OHR IMMUNITY FOLLOWING CLOSURE

THE TERRITORIAL LIMITS OF OHR'S CURRENT IMMUNITIES: The terms of Annex 10 to the General Framework Agreement for Peace (GFAP) grant the High Representative, his office (OHR), and staff the same privileges and immunities as those granted to diplomatic agents and missions by the Vienna Convention on Diplomatic Relations. This grant of immunity is geographically limited to the territories of the GFAP signatories, BIH, Croatia, Serbia, and Montenegro (Serbia and Montenegro as successor states to the Federal Republic of Yugoslavia, which was the original signatory.)

THE HIGH REPRESENTATIVE'S UNIQUE, EXECUTIVE POWERS: Annex 10 also grants extraordinary executive powers (commonly referred to as the Bonn Powers) to the High Representative. Over the past 13 years, the six High Representatives from six different European countries have used those powers to sanction individuals and businesses that have threatened to obstruct the peace implementations process. Bank accounts have been frozen, the ability to travel has been restricted, business assets have been seized, individuals have been denied the right to run for political office, other individuals have been removed from elected and appointed political offices, and still others have been removed from positions within state-owned companies, police forces, and other public institutions.

All actions of the High Representative have been taken under the authority of Annex 10 of the GFAP with the approval of the Peace Implementation Council. The UNSC regularly endorses, under Chapter VII of the UN Charter, the reports of the High Representative and reaffirms that the High Representative can make binding decisions on issues as elaborated by the PIC.

THE THREAT TO THIRTEEN YEARS OF PEACE IMPLEMENTATION:

-- A. Recent legal challenges to OHR's authority: Dodik's recent threats to initiate legal proceedings against the Principal Deputy High Representative and the RS government's hiring of a U.S. based law firm to "advise and represent (the RS) with respect to (...) implementation of the Dayton Peace Accords and activities of the High Representatives" are only the most recent manifestations of the potential threat to 13 years of peace implementation.

-- B. Current litigation involving OHR: There is an active case in the U.S., which also illustrates the threat. In that case, a Serbian businessman has sued an NGO for defamation and he is pursuing a court order that would force former OHR staff to give testimony concerning work performed while they were employed in the Anti-Fraud Department of OHR. These former staff members had access to highly confidential information, some of which was provided by government security services, anonymous sources, and military

intelligence. The businessman is allegedly linked with Serbian organized crime and the criminal networks that continue to support individuals under indictment for war crimes. OHR and the broader International Community have an interest in protecting the confidentiality of that information. These specific, former OHR staff, and others similarly situated, will be left unprotected once OHR closes.

-- C. Past Threats: There have been other explicit threats of litigation outside of the GFAP countries. A business based in London threatened suit against HR Ashdown over audits that he commissioned and allegations of fraud and corruption against the company that resulted from those audits. There is an ongoing fraud investigation in the U.K., which is looking into that company's business transactions in BiH, Serbia and Montenegro.

HR Petritsch was threatened with legal action by account holders after he ordered the seizure of the Hercegovacka Bank and the Appointment of an international administrator. The bank was seized because it was involved in money laundering and other activities that threatened to undermine the GFAP. The seizure and liquidations of the banks' assets affected account-holders in the U.S. and Europe.

-- D. Ongoing OHR Activities That Create Legal Risks: Legal threats may also arise from current or ongoing activities. A new analysis cell has recently been created within OHR for the purpose of tracking and preventing the funding of organized crime, particularly crime that financially supports persons indicated for war crimes and terrorist networks. In addition, many of the orders that froze bank accounts, restricted travel, or prohibited individuals from holding certain positions in government institutions remain in force and will continue to remain in force at least until OHR closure. Some of these ongoing efforts, and the continuing sanctions, could give rise to legal claims outside of the GFAP countries.

In addition to the legal threats that might arise from the High Representative's use of his Bonn Powers, there are more mundane legal issues that may arise after closure of OHR. In the past, two international employees have had their contracts terminated and both have threatened suit against the individuals involved in their termination. One of those employees has recently carried through on his threat by filing a wrongful termination lawsuit in the United States. OHR has retained U.S. counsel and has been forced to spend significant resources defending that claim.

Once OHR closes, most members of the OHR's staff who have worked on issues that resulted in sanctions against individuals or business or that adversely affected someone financially will leave the territorial protections of the GFAP immunity. They will be legally vulnerable and without the political and financial protections of the PIC.

CURRENT PLANNING TO APPOINT AN INTEREST REPRESENTATIVE AND ITS LIMITATIONS: As part of its planning for closure, OHR has been developing a plan to appoint an Interest Representative for purposes of maintaining and protecting OHR's confidential archive and asserting immunity within the territory of the GFAP signatories on behalf of former OHR staff. That planning has progressed to the point where it could be finalized in a relatively short period of time, assuming the cooperation of the GFAP signatories. However, the interest representative scheme would leave OHR staff exposed to legal actions brought outside of the GFAP territories.

SEEKING A BROADER GRANT OF IMMUNITY: There is no clear, easy solution to this problem. But three possible options have emerged. All will require further discussions among PIC Steering Board members, the U.N. Secretariat, and UNSC members.

-- 1. A direct Grant of Immunity from the UNSC: The OHR Legal Department has begun consultations with some members of the UNSC, at a working level, to discuss the possibility of a grant of immunity for OHR in a UNSC resolution. UNSC Resolution 1483 provides a precedent. Although UNSCR 1483 grants immunity to property interest, the concept is the same- a directive to all member States to "take any steps that may be necessary under their respective domestic legal system to assure" the immunities deemed necessary to protect international peace and security. In the case of OHR, it would be a grant of immunity from legal process for the purpose of protecting the accomplishments of the High Representative and his staff in implementing the civilian aspects of the GFAP, as endorsed by the UNSC under Chapter VII of the UN Charter.

-- 2. A grant of Immunity through Application of the Convention on Privileges and Immunities of the United Nations: It should be possible for the UNSC to bring OHR staff within the terms of the Convention of Privileges and Immunities of the United Nations. For instance, OHR professional staff might explicitly be designated as "Experts on Mission" within the meaning of Article VI of the Convention thereby granting those employees functional

immunity for work performed on behalf of OHR.

-- 3. PIC Commitment to Immunity for OHR: Another possibility is to ask all PIC, or PIC Steering Board, members to grant OHR immunity through domestic legislation. Obviously, that option would not have the legal force of a UNSC resolution issued under Chapter VII. It would be purely voluntary and it would be extremely difficult to know which members actually followed through on their commitment. OHR would close with a great deal of uncertainty about how and where immunities might apply throughout the world.

CONCLUSION: During initial conversations with embassies and foreign offices, several questions and concerns have been raised about the options outlined above. No doubt, there are novel and complex legal issues involved. However, no insurmountable obstacle has been identified that would prevent a resolution of this problem. If there is recognition of the threat and the political will to confront it, then an appropriate legal framework can be found.

Notes:

-- The Interest Representative would be appointed pursuant to the provisions of article 45 of the Vienna Convention on Diplomatic Relations.

-- UNSC 1483 granted immunity to "petroleum, petroleum products, and natural gas originating in Iraq (...) as well as the Development Fund for Iraq."

-- Specifically, immunity for OHR staff "from legal process in respect of words spoken or written and all acts performed by them in their official capacity." See, Convention on Privileges and Immunities of the United Nations, Article V, Section 18 (a).

END TEXT
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